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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALEX LANGE,

Plaintiff and Appellant,

v.

SANDRA ZAMBITO et al.,

Defendants and Respondents.

D060896

(Super. Ct. No. 37-2010-00059676-  
CU-OR-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed.

This case arises out of plaintiff Alex Lange's alleged loss of personal property after he was arrested for trespassing and vandalism at a property located in Valley Center, California (the subject property). In his third amended complaint, Lange, suing in propria persona, attempted to plead causes of action for conspiracy, conversion, negligence, and intentional infliction of emotional distress against defendants PNC Mortgage (PNC), its

representative Kim Haynes, and Sandra Zambito, a prospective purchaser of the property (collectively, defendants).<sup>1</sup>

The arguments advanced in Lange's four-page opening brief are largely unintelligible and irrelevant to the appeal herein. However, it appears Lange is asserting that the trial court erred in sustaining defendants' demurrer because Lange included sufficient allegations to state his claims for conspiracy, conversion, negligence, and intentional infliction of emotional distress against defendants in the third amended complaint. We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

Because this is an appeal from a judgment following an order sustaining a demurrer without leave to amend, we take the factual background from the facts alleged in Lange's third amended complaint and any exhibits thereto. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).

On an unknown date in 2010, Lange broke into the subject property. At that time, Lange brought items of his personal property with him. At all times relevant to Lange's third amended complaint, Mark and Jana Rabe owned the subject property.

On May 30, 2010, Lange was arrested at the subject property and charged with trespassing and vandalism. Lange alleges that after the charges and related restraining order against him were dismissed, he sent a letter to Zambito requesting the return of his personal property. In response, Lange allegedly received an unsigned letter, which he

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<sup>1</sup> He also named as defendants Mark and Jana Rabe, who are not parties to this appeal.

believes is from Mark and Jana Rabe, informing him that his personal property had been moved to a storage unit, to which he would be provided a key in exchange for \$2,240 for damage he caused to the subject property.

Lange further alleges that on or about October 20, 2010, he received a letter from Zambito's counsel informing him that PNC was the note holder for the subject property. Lange alleges that on or about October 28, 2010, he sent correspondence to Haynes, a representative of PNC, requesting access to his personal property, but alleges that he did not receive a response.

As will be discussed in more detail, *post*, the causes of action pled in the third amended complaint contained improper conclusions and omitted elements essential to each claim.

After several demurrers that were sustained with leave to amend, defendants filed demurrers to the third amended complaint. The court sustained the demurrers without leave to amend, finding that none of Lange's causes of action stated sufficient facts to maintain a cause of action for conspiracy, conversion, negligence, or intentional infliction of emotional distress against defendants. On November 17, 2011, the court entered a judgment of dismissal with prejudice as to defendants.

## DISCUSSION

### I. *STANDARD OF REVIEW*

A demurrer tests the legal sufficiency of the complaint, and the granting of leave to amend involves the trial court's discretion. Therefore, appellate courts employ two separate standards of review on appeal. (*Blank, supra*, 39 Cal.3d at p. 318.) First, the

complaint is reviewed de novo to determine whether it contains sufficient facts to state a cause of action. (*Hill v. Miller* (1966) 64 Cal.2d 757, 759.) In reviewing the sufficiency of a complaint against a general demurrer, we assume the truth of all properly pled material facts. (*Blank, supra*, 39 Cal.3d at p. 318.) However, we do not assume the truth of contentions, deductions, or conclusions of fact or law. (*Ibid.*)

Second, where the demurrer is sustained without leave to amend, reviewing courts determine whether the trial court abused its discretion in doing so. (*Kilgore v. Younger* (1982) 30 Cal.3d 770, 781.) On review of a trial court's refusal to grant leave to amend, the appellate court will only reverse for abuse of discretion if it determines there is a reasonable possibility the pleading can be cured by amendment. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) The burden of proving that there is reasonable possibility that the defect can be cured by amendment is on the plaintiff. (*Blank, supra*, 39 Cal.3d at p. 318.)

## II. ANALYSIS

### A. *The First Cause of Action for Conspiracy (Alleged Against Zambito)*

Conspiracy itself is not a separate cause of action; rather, it is a theory of vicarious liability under which certain defendants may be held liable for torts committed by others. That is, all parties to a conspiracy are jointly liable for tortious acts committed by any of them pursuant to the conspiracy. (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 454.) The complaint must allege acts that give rise to a tort cause of action without the conspiracy; absent such allegation, the conspiracy allegation is meaningless. (*Manor Investment Company v. F. W. Woolworth Co.* (1984) 159 Cal.App.3d 586, 595.)

Conclusory allegations of a "conspiracy" will not withstand demurrer. For example, merely pleading that "defendants conspired to conceal improper loss valuations" constitutes a bare legal conclusion as to which a demurrer lies. (*State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 419.)

Lange's conspiracy allegation in the third amended complaint only alleges that "[d]efendants Sandra Zambito, Jana Rabe, and Mark Rabe conspired to convert Plaintiff's property for themselves and/or use the property to extort money from Plaintiff." Thus, Zambito's demurrer was properly sustained as to this conclusory allegation of "conspiracy," because there is no allegation of a separate tort cause of action upon which the conspiracy claim is based.

*B. The Second Cause of Action for Conversion (Alleged Against Zambito)*

To state a cause of action for conversion, a plaintiff must allege his or her "ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages." (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507 (*Shopoff*)). The foundation for a conversion claim "rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. . . ." (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1065.)

In his third amended complaint, Lange alleged he owns personal property, Zambito removed it from the subject residence, and Lange suffered damages in the form of the loss of the property. However, Lange's allegations are insufficient to maintain a

cause of action for conversion against Zambito, as he has not alleged any facts showing that the alleged removal of property was wrongful. (*Shopoff, supra*, 167 Cal.App.4th at p. 1507.)

C. *The Third Cause of Action for Negligence (Alleged Against Zambito)*

To successfully plead a cause of action for negligence, a plaintiff must allege the following elements: (1) the defendant had a legal duty of care to the plaintiff; (2) the defendant breached the duty of care; (3) the defendant's failure was the proximate or legal cause of the resulting injury; and (4) the plaintiff was damaged. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) A complaint is fatally defective if it fails to sufficiently plead facts showing a duty of care, injury or damage. (*Hegyesh v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1111.)

Lange failed to allege any facts sufficient to establish Zambito owed him a duty of care. Lange only alleged in conclusory terms that "[t]he Defendant's [*sic*] negligence was a substantial factor in causing harm to Plaintiff," and "It is difficult for Plaintiff to comprehend that Defendants were not negligent in their relationship to personal property they knew was not their own." There is no allegation that Zambito owed a duty of care to Lange. Accordingly, Lange has failed to state facts sufficient to maintain a cause of action for negligence against Zambito.

D. *The Fourth Cause of Action for Conversion (Alleged Against Haynes and PNC)*

As stated, *ante*, to state a cause of action for conversion, a plaintiff must allege his " "ownership or right to possession of the property at the time of the conversion; the

defendant's conversion *by a wrongful act* or disposition of property rights; and damages." ' ' ' (Shopoff, supra, 167 Cal.App.4th at p. 1507, italics added.)

As with Zambito, in the third amended complaint Lange fails to allege what wrongful act was committed by Haynes and PNC with respect to his personal property. Rather, he only alleges that he has legal ownership of his personal property and that after informing these defendants of such, Lange received no response. Lange then makes the conclusory allegation, without any underlying facts, that these defendants converted his property by "preventing [Lange] from having access to his property and/or by refusing to return the property after [Lange] demanded its return." However, such an allegation does not constitute a factual allegation that must be taken as true on demurrer. Rather, exhibit 1 to Lange's complaint specifically states that Lange's personal property had been removed to a storage unit, and there are no allegations that defendants were ever actually in control of Lange's personal property or the storage unit to which the personal property had been purportedly removed. As alleged, PNC is the holder of the note on the subject property, and Haynes is a representative of PNC. Lange has not alleged any wrongful acts by either of these defendants and therefore the third amended complaint does not allege the elements required to state a cause of action for conversion.

*E. The Fifth Cause of Action for Negligence (Alleged Against Haynes and PNC)*

Lange's fifth cause of action alleges negligence by Haynes and PNC. Again, to successfully plead a cause of action for negligence, a plaintiff must allege the following elements: (1) the defendant had a legal duty of care to the plaintiff; (2) the defendant breached the duty of care; (3) the defendant's was the proximate or legal cause of the

plaintiff's injury; and (4) the plaintiff was damaged. (*Ladd v. County of San Mateo*, *supra*, 12 Cal.4th at p. 917.)

As with Zambito, the third amended complaint does not allege Lange had a relationship with PNC and Haynes which would give rise to a duty of care to Lange. Lange's negligence cause of action relies solely on the allegation that these defendants knew that the personal property belonged to Lange and did not arrange for its return. Accordingly, the trial court did not err in sustaining PNC and Haynes's demurrer to the fifth cause of action for negligence.

*F. The Sixth Cause of Action for Intentional Infliction of Emotional Distress (Alleged Against All Defendants)*

To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege the following elements: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) For conduct to be outrageous, it "must be so extreme as to exceed all bounds of that usually tolerated by a civilized community." (*Ibid.*, quoting *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209; also see BAJI No. 12.74.)

Here, Lange has failed to allege any facts to show that defendants' conduct with regard to Lange's allegedly converted personal property was extreme and outrageous. Rather, Lange's sole allegation against defendants is that they failed to respond to his

request to regain possession of his personal property. However, an alleged nonresponse by defendants' to Lange's request for the return of his personal property does not rise to the level of outrageous and extreme conduct. As such, the trial court properly sustained defendants' demurrer to Lange's sixth cause of action.

#### DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.